

February 20, 2013

Anthony Silva, Mayor  
Post Office Box 5849  
Stockton, CA 95205

Re: Your Request for Advice  
**Our File No. A-13-006**

Dear Mr. Silva:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter is based only on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as Government Code Section 1090, common law conflict of interest, or restrictions on incompatible activities your agency may impose. You should consult your agency’s counsel regarding these, and any other law, that may apply.

### QUESTION

In light of your employment with the Boys and Girls Club of Stockton, do you have a conflict of interest under the Act in a decision to grant funds to the club if you remove yourself from the decision and/or abstain from voting on the decision?

### CONCLUSION

As analyzed below, you may not make, participate in making, or attempt to use your position to influence a governmental decision regarding a grant to the club. Accordingly, you must remove yourself from the decision and refrain from voting on the decision. We note that in removing yourself from the decision, you are prohibited from contacting, appearing before, or otherwise attempting to influence, any member, officer, employee, or consultant of your agency

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

regarding the grant. To the extent that you do not make, participate in making, or attempt to use your position to influence the decision, the Act's conflict-of-interest provisions do not apply.

## **FACTS**

You were recently elected Mayor of the City of Stockton. Additionally, you are continuing to hold a paid job as the Executive Director of the Boys and Girls Club of Stockton, a non-profit organization. Previously, the Boys and Girls Club of Stockton has received a \$10,000 grant from the City of Stockton to operate an inner city pool that is open to the public, and you expect the club to apply for the same grant in the future.

## **ANALYSIS**

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

### **Step One: Are you a "public official?"**

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency...." (Section 82048.) As the Mayor of the City of Stockton, you are a public official within the meaning of the Act.<sup>2</sup>

### **Step Two: Are you making, participating in making, or influencing a governmental decision?**

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker

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<sup>2</sup> If a public official's office is listed in Section 87200, which specifically includes mayors and city council members, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5 subdivisions (c) and (d) apply. (Section 87105.)

regarding the governmental decision. (Regulation 18702.2.) For a decision before the official's own agency, a public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of the agency. (Regulation 18702.3.) You are making, participating in making, or influencing a governmental decision if you take part in a city decision regarding a grant to the Boys and Girls Club.

### **Step Three: What are your economic interests?**

Of the economic interests recognized under the Act<sup>3</sup>, those potential interests implicated by your account of the facts are the following:

*Business Entity* – A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(a) and (b).) However, only for-profit businesses are defined by the Act as business entities. (Section 82005.) Because the Boys and Girls Club is a nonprofit organization, you do not have an economic interest in the club as a business entity under either Section 87103(a) or (d).

*Source of Income* – A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.) Presumably, you will receive \$500 or more from the Boys and Girls Club in the 12 months prior to any decision to renew the club's grant. Notwithstanding the fact that you do not have an economic interest in the club as a business entity, it appears that you do have an economic interest in the club as a source of income.

*Personal Finances* – A public official will always have an economic interest in his or her personal finances. A governmental decision will have an effect on an official's economic interest in his or her personal finances if the decision will result in the personal expenses, income, assets or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.)

### **Step Four: Are your economic interests directly or indirectly involved in the decision?**

*Source of Income* – Regulation 18704.1(a) states that a source of income is directly involved in a decision before the official's agency when that source of income, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

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<sup>3</sup> Our analysis is limited to the potential economic interests you have identified.

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Sources of income that are *not* directly involved in governmental decisions are regarded as *indirectly* involved. (Regulations 18704(a) and 18704.1(b).)

For purposes of your question, your economic interest in the Boys and Girls Club as a source of income is directly involved in a city decision regarding a grant to the club.<sup>4</sup>

*Personal Finances* – An official’s economic interest in his or her personal finances is deemed to be directly involved in the governmental decision if facts suggest any financial effect on the economic interest. (Regulation 18704.5.)

**Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your economic interests?**

**Materiality**

Having identified the economic interests involved, and determined whether each interest is directly or indirectly involved in the decision at issue, it is necessary to identify the materiality standard appropriate to each economic interest.

*Source of Income* – the materiality standard for a *directly* involved economic interest in a source of income is provided in Regulation 18705.3(a), which states:

“Any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official’s agency, is deemed material.”

In other words, the size of a financial effect on a directly involved source of income does not matter. If there is *any* financial effect at all, even “one-penny,” that effect is presumed to be material.

*Personal Finances* – An effect on an official’s personal finances is material as stated in Regulation 18705.5(a), which provides, “A reasonably foreseeable financial effect on a public official’s personal finances is material if it is at least \$250 in any 12-month period.”

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<sup>4</sup> Please note, there may also be circumstances when the Boys and Girl’s club may be indirectly involved in decisions before you but still may be materially and foreseeably affected. We do not discuss the standards here. However, if you believe such a circumstance may exist, you should contact us for further advice.

### **Foreseeability**

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an economic interest need not be certain or even substantially likely to be “reasonably foreseeable,” but it must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

For a city decision regarding a grant to the Boys and Girls Club, the facts you have provided indicate a reasonably foreseeable material financial effect on your economic interest in the club because the grant will have more than a one-penny effect on the club, and *any* financial effect on a source of income directly involved in a decision is deemed material. Accordingly, you are prohibited from making, participating in making, or influencing the decision.<sup>5</sup>

### **Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?**

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the official’s economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).) Additionally, in certain rare circumstances, an official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the “public generally” or the “legally required participation” exceptions are applicable to your circumstances, so we do not address them further.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Brian G. Lau  
Counsel, Legal Division

BGL:jgl

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<sup>5</sup> In light of this conclusion, it is unnecessary for us to further consider any additional financial effect under the personal financial effect rule, which has a materiality standard of \$250.